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No. 90-559

JAN 31 1991
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In the Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN IRON AND STEEL INSTITUTE, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency permissibly revised the primary national ambient air quality standards for particulate matter, pursuant to Section 109 of the Clean Air Act (42 U.S.C. 7409).

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OPINION BELOW

The opinion of the court of appeals (90-257 Pet. App. 1a-75a)[1] is reported at 902 F.2d 962. The order of the court of appeals vacating Part IV and the separate opinions concerning Part IV (App., *infra*, 1a) is not yet reported.

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[1] Petitioner cites the court of appeals' opinion as reprinted in the petition appendix of *National Coal Ass'n* v. *National Resources Defense Council, Inc.*, No. 90-257. See Pet. 1 n.1. For clarity, we will cite the *National Coal Ass'n* petition appendix as "90-257 Pet. App.," and petitioner's own appendix as "90-559 Pet. App."

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1990. 90-257 Pet. App. 1a. On July 3, 1990, the court of appeals denied a petition for rehearing. *Id.* at 93a. The petition for a writ of certiorari was filed on October 1, 1990. On January 2, 1991, the court of appeals vacated Part IV and the separate opinions concerning Part IV. App., *infra*, 1a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act, 42 U.S.C. 7401 *et seq.*, provides a comprehensive program for controlling air pollution, using both federal and state regulation. The structure of the Clean Air Act (CAA or the Act), as in effect at the time of these proceedings, dates from 1970 amendments to the previous statute, supplemented by further important amendments in 1977. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. See generally *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2530 (1990); *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 845-849 (1984); *Train* v. *NRDC, Inc.*, 421 U.S. 60, 63-67 (1975).[2]

Under Section 108(a) of the Act, EPA issues air quality criteria documents reviewing scientific evidence about the possible effects of certain listed air pollutants that endanger the public health or wel-

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[2] The Clean Air Act was substantially revised by additional amendments in 1990. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399. The amendments do not directly affect the issue presented in this case. All citations are to the pre-1990 version of the Act.

fare. 42 U.S.C. 7408(a). Pursuant to Section 109(b) of the Act, EPA must, for each such pollutant, promulgate "primary" national ambient air quality standards (NAAQS) "to protect the public health" and "secondary" NAAQS "to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. 7409(b).

The Administrator of EPA is directed to review the Agency's air quality criteria and NAAQS by December 31, 1980, and at least every five years thereafter, and to "make such revisions in such criteria and standards and promulgate such new standards as may be appropriate." 42 U.S.C. 7409(d)(1). Within nine months after the promulgation of a NAAQS or any "revision thereof," the States must draft or revise state implementation plans (SIPs) to achieve and maintain compliance with the NAAQS. 42 U.S.C. 7410(a)(1). States must submit their SIPs to EPA for approval or disapproval under the criteria set forth in Section 110(a)(2) of the CAA, 42 U.S.C. 7410(a)(2).

2. "Particulate matter" is the generic term for a broad class of chemically and physically diverse particles that exist in the air as discrete liquid droplets or as solids. For regulatory purposes, the term includes all of the particles captured and filtered by an air-sampling device meeting certain specifications. 90-257 Pet. App. 5a; 49 Fed. Reg. 10,410 (1984).

a. On April 28, 1971, EPA promulgated primary and secondary NAAQS for particulate matter under Section 109 of the CAA, 42 U.S.C. 7409. 36 Fed. Reg. 8186 (1971). These standards were set in terms of "total suspended particulate" (TSP) as measured by a specified sampling device. See *id.* at 8191-8193; 90-257 Pet. App. 6a.

b. In October 1979, pursuant to Section 109(d) of the CAA, EPA announced that it would reexamine the scientific evidence concerning health and welfare effects associated with particulate matter and review the existing air quality standards for possible revisions. 44 Fed. Reg. 56,730. In 1982, EPA published a Revised Criteria Document for particulate matter. An accompanying Staff Paper recommended replacing the TSP measurement of particulate matter with a measurement focused on particles with an aerodynamic diameter of 10 microns or less (known as PM10). 90-257 Pet. App. 5a, 10a.

c. In March 1984, EPA formally proposed revisions to the particulate matter standards. 49 Fed. Reg. 10,408. EPA noted that a TSP indicator, in contrast to a PM10 indicator, "directs control efforts toward larger particles that * * * are of less concern to health than smaller particles." *Id.* at 10,412. EPA thus proposed to replace its primary standards for particulate matter based upon TSP with primary standards based upon PM10. *Ibid.*

EPA also discussed the possible PM10 levels for the primary NAAQS. The Agency explained that there would be two standards—a 24-hour standard and an annual standard. For the 24-hour standard, it proposed selecting a level from a range of 150 to 250 micrograms per cubic meter (μg/m3), and, for the annual standard, it proposed a range of between 50 and 65 μg/m3. The Agency also explained that, in light of "the precautionary nature" of Section 109, the Administrator was likely to select a standard from the "lower portion" of each range. 49 Fed. Reg. 10,415-10,417 (1984).[3]

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[3] For the *secondary* particulate matter standards, EPA proposed retaining TSP as the indicator, but also asked for pub-

d. On July 1, 1987, EPA published a final rule revising the particulate matter NAAQS. 52 Fed. Reg. 24,634; 90-257 Pet. App. 76a. As proposed, EPA replaced TSP with PM10 as the new indicator for the primary standards. 90-257 Pet. App. 76a. Based on its evaluation of the relevant health studies, EPA selected a 24-hour PM10 standard of 150 μg/m3, and an annual PM10 standard of 50 μg/m3. *Ibid.*; 90-559 Pet. App. 21a-36a.[4] The Agency concluded that a 24-hour PM10 standard greater than 150 μg/m3 would "present an unacceptable risk of premature mortality" and allow the possibility of significant lung function changes. 90-559 Pet. App. 31a. EPA similarly relied upon the available "long-term quantitative studies" and "qualitative data from a number of epidemiological, animal and ambient particle composition studies" to arrive at an annual PM10 standard of 50 μg/m3. *Id.* at 34a-35a.[5]

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lic comment on the alternative of establishing secondary standards equivalent to the primary standards in all respects. 49 Fed. Reg. 10,418-10,419 (1984).

[4] In 1986, on the basis of additional studies, EPA's staff had revised its own recommendations for 24-hour PM10 standards and for annual PM10 standards. 90-257 Pet. App. 10a-11a.

[5] A table in the preamble to the final PM10 standards (reprinted at 90-559 Pet. App. 24a) contained several printing errors, which were the subject of published corrections two weeks later. See 52 Fed. Reg. 26,401 (1987). Additionally, rather than adopting its proposed secondary TSP standards, EPA promulgated secondary 24-hour and annual PM10 standards identical in all respects to the primary standards. 90-257 Pet. App. 77a. This decision was based in part upon public comments pointing out the limitations of TSP as an indicator, as well as upon a lack of "convincing scientific support for maintaining TSP as an indicator for the secondary standards." *Id.* at 79a.

3. Petitioner and several other parties filed timely petitions for review of various aspects of the July 1, 1987 regulations. See 42 U.S.C. 7607(b)(1).[6] For its part, petitioner challenged the primary NAAQS for particulate matter. As the court of appeals pointed out, petitioner did not challenge the use of a PM10 measurement; nor did it contest EPA's retention of both a short term (twenty-four hour) and long term (annual) standard for particulate matter. 90-257 Pet. App. 11a. Rather, petitioner's challenge was to the numerical levels in the NAAQS. Petitioner challenged these levels in two principal respects. First, petitioner argued that the selection of the particular numerical levels was arbitrary and capricious. Second, petitioner contended that EPA's procedure for setting primary air quality standards under Section 109 of the CAA was inconsistent with the court of appeals' decision in *Natural Resources Defense Council, Inc.* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*Vinyl Chloride*), which concerned EPA's national emission standards for hazardous air pollutants under Section 112 of the CAA (42 U.S.C. 7412).[7]

The court of appeals unanimously rejected both of these arguments. With respect to the 24-hour primary standard, the court concluded that, "[i]n setting a standard under § 109, the Administrator must

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[6] Petitioner also filed a petition for reconsideration with EPA, which the Agency denied. 53 Fed. Reg. 52,698 (1988).

[7] Petitioner also claimed that EPA had improperly failed to consider possible health effects from unemployment and to give States appropriate up-to-date information about PM10 control techniques. The court of appeals rejected the first argument (90-257 Pet. App. 21a) and held that petitioner did not have standing to raise the second (*id.* at 25a-28a). Petitioner does not pursue either claim in this Court.

take into account all the relevant studies revealed in the record and make an informed judgment based on available evidence. * * * The record shows that the Administrator did so." 90-257 Pet. App. 17a (internal quotation marks omitted). Similarly, with respect to the annual primary standard, the court of appeals concluded that "[t]he record is replete with support for the final standard." *Id.* at 18a. On both points, the court of appeals discussed in detail the applicable studies and other factual evidence that supported the primary standards chosen by EPA. *Id.* at 13a-21a.

Petitioner's argument concerning the *Vinyl Chloride* decision also failed to persuade the court of appeals. 90-257 Pet. App. 21a-23a. The court contrasted Section 112 of the CAA, under which EPA "*may* consider cost and technological feasibility in selecting levels for hazardous pollutant standards," with Section 109, under which EPA "*may not* consider cost and technological feasibility." 90-257 Pet. App. 22a. Because of this distinction, the court of appeals concluded that "[t]he two-step methodological requirement endorsed by *Vinyl Chloride*" for emissions standards under Section 112 "is inapposite to actions under § 109." *Ibid.*[8]

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[8] In the court of appeals, certain other parties (Natural Resources Defense Council, et al. (NRDC)) also raised an objection to EPA's treatment of an issue in the secondary standards for particulate matter (the welfare effects of visibility impairment and acid deposition). See 90-257 Pet. App. 35a-75a. The court of appeals concluded, *per curiam*, that EPA had engaged in final action on acid deposition but not visibility impairment and remanded to EPA for a statement of reasons concerning acid deposition. *Id.* at 35a-36a. The judges were split on that issue, however: Judge Silberman would have found no final agency action on either issue (*id.* at 69a-75a), Judge Edwards would have found final agency

ARGUMENT

Petitioner renews its contention that, as in *Vinyl Chloride*, the Administrator must determine a single level that is "safe" before determining the permissible "margin of safety." Pet. 13-14, 15-16. Petitioner's suggestion is erroneous, and its claim does not warrant review.

Section 109(b)(1) explicitly directs the Administrator to formulate a NAAQS that, in his judgment, reflects "an adequate margin of safety * * * requisite to protect the public health." 42 U.S.C. 7409 (b)(1). As the Administrator noted in denying petitioner's petition for reconsideration, the court of appeals had already held that EPA need not adopt a two-step process for setting NAAQS under Section 109 and that the choice of approach in determining the margin of safety "is a policy choice of the type that Congress specifically left to the Administrator's judgment." 53 Fed. Reg. 52,700-52,701 (1988); *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1161-1162 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980). Three separate panels of the court of appeals have now upheld—without a single dissent—EPA's pro-

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action on both issues (*id.* at 56a-68a), and Chief Judge Wald concluded that only the acid deposition action was final (*id.* at 37a-55a). The petitions in *National Coal Ass'n* v. *NRDC*, No. 90-257 and *Alabama Power Co.* v. *NRDC*, No. 90-558 challenged the court of appeals' remand on the acid deposition issue. In November 1990, in light of the Clean Air Act Amendments of 1990, NRDC moved in the court of appeals to dismiss its initial petition for review; on January 2, 1991, the court of appeals granted the motion and vacated Part IV of its opinion and the separate opinions. App., *infra*, 1a. National Coal Association and Alabama Power Company then moved to dismiss their petitions in this Court, and the Clerk of this Court granted the motion on January 24, 1991.

cedure for establishing NAAQS under Section 109, in which the Administrator has determined the appropriate "margin of safety" without petitioner's two-step procedure. 90-257 Pet. App. 21a-23a; *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1184-1187 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); *Lead Indus. Ass'n* v. *EPA*, 647 F.2d at 1148-1156, 1161-1162. Thus, while petitioner correctly notes that the Act's judicial review provisions "eliminate any possibility of a conflict among the circuits" on this point (Pet. 10; see 42 U.S.C. 7607(b)(1)), there is no reason to believe that the petition raises a controversial or unsettled issue of federal law.[9]

Petitioner's reliance on *Vinyl Chloride* and its explication of the requirements for Section 112 is entirely misplaced. In that unanimous *en banc* decision, the court explained that a two-step methodology (in which EPA must determine a "safe" level and then the appropriate "margin of safety") was necessary because Section 112 requires the consideration of economic and technological factors. Indeed, the court specifically explained that differences between Section 109 and Section 112 permit EPA to consider economic and technological feasibility in setting standards un-

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[9] Petitioner's suggestion (Pet. 10-11, 15) that the Administrator did not determine the PM10 level " 'requisite to protect the public health' " and to provide an " 'adequate margin of safety' " is incorrect. See, *e.g.*, 90-559 Pet. App. 5a-6a, 35a-36a. As the court of appeals emphasized, "the Administrator determined the primary standards for particulate matter based solely upon the risk to health. Methodologically, that is all that is required under § 109." 90-257 Pet. App. 23a. Petitioner's disagreement with the method for reaching that judgment does not justify the erroneous suggestion that no judgment was reached at all.

der the latter Section but not under the former. *Vinyl Chloride*, 824 F.2d at 1157-1159. All three members of the court of appeals panel below participated in the consideration of the *Vinyl Chloride* decision, and all three agreed that *Vinyl Chloride* is inapposite to EPA's setting of Section 109 air quality standards. 90-257 Pet. App. 22a. The court's interpretation of Section 109 is consistent with the view that EPA has repeatedly expressed from the time the Agency first promulgated ambient air quality standards in 1971. See, *e.g.*, 50 Fed. Reg. 37,484, 37,499 (1985) (carbon monoxide); 44 Fed. Reg. 8202, 8203 (1979) (ozone); 43 Fed. Reg. 46,246, 46,247, 46,256 (1978) (lead); 36 Fed. Reg. 8186 (1971) (original standards for six pollutants). The court of appeals correctly determined that the rationale for the two-step procedure under Section 112 is not applicable to Section 109.

Petitioner further contends (Pet. 15) that EPA's standard setting under Section 109 precludes meaningful judicial review. The court of appeals' decision belies this contention, however. As the court of appeals emphasized, EPA fully explained its approach to setting air quality standards with an adequate margin of safety (90-559 Pet. App. 21a-23a) and then set forth in detail how it applied this approach to both the 24-hour and annual primary standards for particulate matter. *Id.* at 23a-36a. Applying the appropriate standard of review, the court of appeals itself examined in detail the record evidence upon which EPA based its standards. 90-257 Pet. App. 12a-21a. This case thus clearly does not raise a significant legal issue regarding the availability of meaningful judicial review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1991

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* The Solicitor General is disqualified in this case.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1990

No. 87-1438

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
PETITIONERS

v.

ADMINISTRATOR, U. S. ENVIRONMENTAL
PROTECTION AGENCY, ET AL., RESPONDENTS

[Filed Jan. 2, 1991]

and Consolidated Cases 87-1441, 87-1442,
87-1443, 88-1913 and 89-1013

BEFORE: Wald, Chief Judge; Edwards and Silberman, Circuit Judges

ORDER

Upon consideration of the motion of petitioners in case No. 87-1438 for voluntary dismissal and of the response thereto it is

ORDERED, by the court, that the motion is granted and case no. 87-1438 is dismissed. The consolidation of no. 87-1438 with the remaining cases is vacated.

It is Further Ordered, by the court, that Part IV of the court's opinion of April 27, 1990, and the separate opinions of Chief Judge Wald and Circuit Judges Edwards and Silberman which follow Part IV, be, and the same hereby are, vacated.

The Clerk is directed to transmit a certified copy of this order to Respondent, in lieu of a partial, formal mandate.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

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